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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
MCALLEN DIVISION**

MC ALLEN GRACE BRETHREN  
CHURCH, et al.,

Plaintiffs,

v.

United States Attorney  
General, Alberto Gonzales, et  
al.,

Defendants.

No. 07-CV-060

**DEFENDANTS' MOTION TO  
DISMISS OR, IN THE  
ALTERNATIVE, TO STAY PENDING  
THE RESOLUTION OF PARALLEL  
CRIMINAL PROCEEDING**

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FEDERAL RULES

Fed. R. Civ. P. 12(b)(6) . . . . . 1

1 Federal Defendants, United States Attorney General, Alberto  
2 Gonzales, et al., hereby move to dismiss Plaintiffs' Complaint  
3 pursuant to Federal Rules of Civil Procedure 12(b)(6) and  
4 12(b)(1) or, in the alternative, to stay this action pending the  
5 resolution of criminal proceedings in United States of America v.  
6 Cleveland, 06-MJ-04806 (S.D. Tex.).

#### 7 INTRODUCTION

8 Plaintiffs' Complaint must be dismissed because this action  
9 necessarily challenges the validity of an ongoing criminal  
10 proceeding. Specifically, the operative facts that bring rise to  
11 Plaintiffs' claims in this case arise from the same facts that  
12 are at issue in United States of America v. Cleveland, 06-MJ-  
13 04806, currently pending in the Southern District of Texas. As  
14 discussed below, the Supreme Court held in Heck v. Humphrey, 512  
15 U.S. 477 (1994), that an action may not proceed where success on  
16 a claim would necessarily implicate the validity of a criminal  
17 prosecution involving the same conduct unless the criminal  
18 defendant has successfully terminated the criminal action (e.g.,  
19 a reversal on appeal). Pursuant to Heck, the conviction of  
20 Plaintiff Michael Cleveland in United States of America v.  
21 Cleveland, 06-MJ-04806, and the ongoing appeal of that  
22 conviction, bars Plaintiffs' claims in this suit.

23 With their Complaint, Plaintiffs assert nine separate claims  
24 against Defendants. First, Plaintiffs allege that Defendants'  
25 interpretation of the Migratory Bird Treaty Act ("MBTA") and the  
26 Bald and Golden Eagle Protection Act ("BGEPA") violate the  
27

1 Religious Freedom Restoration Act ("RFRA"). Complaint ("Compl.")  
2 at ¶¶ 39-40 (Count One). Second, Plaintiffs claim that  
3 Defendants' application of the MBTA and BGEPA violates  
4 Plaintiffs' free exercise of religion under the First Amendment  
5 to the United States Constitution. Compl. at ¶¶ 41-56 (Count  
6 Two). Third, Plaintiffs contend that Defendants' application of  
7 the MBTA and BGEPA violates the Fifth and Fourteenth Amendments  
8 to the Constitution. Compl. at ¶¶ 57-58 (Count Three). Fourth,  
9 Plaintiffs allege that Defendants' application of the MBTA and  
10 BGEPA is contrary to the statutes' plain language. Compl. at ¶¶  
11 59-63 (Count Four). Fifth, Plaintiffs contend that Defendants'  
12 March 11, 2006 actions -- including the confiscation of feathers  
13 -- violated the Fourth Amendment to the Constitution. Compl. at  
14 64-66 (Count 5). Sixth, Plaintiffs claim that the United States  
15 Fish and Wildlife Service's confiscation of certain feathers  
16 violates their right to due process under the Fifth Amendment to  
17 the Constitution. Compl. at ¶¶ 67-70 (Count Six). Seventh,  
18 Plaintiffs allege that Defendants' actions were arbitrary and  
19 capricious in violation of the Administrative Procedure Act  
20 ("APA"). Compl. at ¶ 71 (Count 7). Eighth, Plaintiffs allege  
21 that Defendants' interpretation of the MBTA violates principles  
22 of international law. Compl. at ¶¶ 72-82 (Count 8). Finally,  
23 Plaintiffs appear to assert an independent claim for alleged  
24 violations of the Declaratory Judgment Act based upon Defendants'  
25 interpretation and application of the MBTA and BGEPA. Compl. at  
26 ¶¶ 83-84 (Count 9).

1 With regard to remedy, Plaintiffs seek a declaratory  
2 judgment stating that Defendants' interpretation of the MBTA and  
3 the BGEPA violate the language of the statutes themselves, the  
4 APA, RFRA, international law, and the Constitution of the United  
5 States. Compl. at ¶¶ 1-5 (Prayer for Relief). In addition,  
6 Plaintiffs seek an order requiring Defendants to return all  
7 "feathers and things seized on or about March 11, 2006," id. at ¶  
8 6, and an order compelling Defendants to "protect the feathers  
9 seized on or about March 11, 2006 . . ." from harm, id. at ¶ 7.  
10 Finally, Plaintiffs ask the Court to issue an order "enjoining  
11 Defendants from enforcing the MBTA and BGEPA against any  
12 Plaintiff anywhere within the jurisdiction of the federal courts  
13 of the United States." Id. at ¶ 5.

14 The Court need go no further than the Supreme Court's  
15 holding in Heck v. Humphrey in order to dismiss this case in its  
16 entirety. Further, if Plaintiffs argue that their claims  
17 regarding the forfeiture of eagle feathers provide an independent  
18 basis for allowing this case to proceed, any such argument would  
19 be futile because the Court lacks jurisdiction over those claims.  
20 Specifically, Plaintiffs' claims regarding the forfeiture of  
21 eagle feathers are not ripe for review due to their failure to  
22 exhaust administrative remedies. Moreover, even assuming that  
23 Plaintiffs could collaterally attack a pending criminal case,  
24 Plaintiffs have failed to name the proper parties as Defendants  
25 in this action. Finally, in the alternative to dismissal,  
26 Federal Defendants request that the Court exercise its inherent  
27



1 authority to stay this action pending the resolution of the  
2 criminal proceeding in United States of America v. Cleveland.

3 **BACKGROUND**

4 **A. FACTUAL BACKGROUND**

5 On March 11, 2006, Agent Alejandro Rodriguez of the United  
6 States Fish and Wildlife Service ("FWS") attended an American  
7 Indian powwow in McAllen, Texas. Compl. at ¶ 38. The powwow was  
8 held at the Palm View Library and Community Center in McAllen; it  
9 was advertised in a local newspaper and was open to the public.

10 Id. Agent Rodriguez approached a vending booth operated by  
11 Plaintiff Mr. Cleveland and his mother, where he observed on  
12 display several "dream catchers" bearing bird feathers. Id.  
13 After making a preliminary determination that the feathers  
14 belonged to protected migratory birds, Agent Rodriguez  
15 confiscated eight feathers, six of which were later confirmed by  
16 laboratory analysis as belonging to bird species protected under  
17 the MBTA. Id. At the powwow, Agent Rodriguez also encountered  
18 Plaintiffs Soto and Russell, who were in the possession of eagle  
19 feathers. Plaintiff Russell's eagles feathers were seized as  
20 being in violation of the BGEPA. Id. The eagle feathers in the  
21 possession of Plaintiff Soto were not seized at the powwow. Id.

22 Plaintiff Mr. Cleveland was subsequently charged with the  
23 unlawful possession, sale, offer to sell, or transportation of  
24 migratory birds, their parts, or eggs without a permit, in  
25 violation of the MBTA, 16 U.S.C. § 703. See Docket Sheet for  
26 United States v. Cleveland, Exhibit 1. After a bench trial  
27

1 before United States Magistrate Judge Dorina Ramos, Mr. Cleveland  
2 was convicted and ordered to pay a \$200 fine. Id. at Doc. No. 57.  
3 Mr. Cleveland has appealed his conviction to the District Court  
4 Judge. Id. Doc. No. 62. The court heard argument on the appeal  
5 on May 17, 2007 and took the matter under advisement. Id. Doc.  
6 No. 68.<sup>1/</sup>

7 On March 23, 2006, Plaintiffs Michael Russell and Robert  
8 Soto (along with their attorney) met with Agent Rodriguez in an  
9 effort to resolve the matter concerning their possession of eagle  
10 feathers. Compl. at ¶ 38. At the meeting, Mr. Russell agreed to  
11 pay a \$500 fine for the possession of eagle feathers and both Mr.  
12 Russell and Mr. Soto agreed to voluntarily abandon the feathers  
13 that they possessed on the day of the powwow. Id.; see also  
14 attachment B to Declaration of Alan R. Woodcock ("Woodcock  
15 Decl."), Exhibit 2.<sup>2/</sup> In exchange, the criminal investigation  
16 was concluded without further criminal charges being filed  
17 against Plaintiffs Soto and Russell. Id. The voluntary  
18 abandonment form signed by Mr. Russell and Mr. Soto provided them

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20 <sup>1/</sup> Because this is a motion to dismiss under Rule 12, the  
21 proceeding facts are taken from Plaintiffs' Complaint or, they are  
22 judicially noticeable official records in the Court's docket. See  
23 infra at 9 (discussing facts properly considered in a Rule 12(b)(6)  
24 motion). If this case proceeds past the pleadings stage,  
25 Defendants reserve the right to dispute any alleged facts as  
26 appropriate.

27 <sup>2/</sup> The Declaration of Alan Woodcock and the accompanying  
attachments support Defendants' jurisdictional arguments regarding  
ripeness/exhaustion and are therefore properly considered in  
deciding the Rule 12(b)(1) portion of this motion. See infra at 10  
(discussing facts properly considered in a Rule 12(b)(1) motion).

1 the right to file a petition for the remission of their property  
2 within 60 days. Id. Mr. Russell and Mr. Soto availed themselves  
3 of this process by petitioning the Department of the Interior for  
4 the remission of the feathers. Woodcock Decl. at ¶¶ 1-7. Their  
5 petition for remission was denied as untimely on February 23,  
6 2007. Id. In accordance with the regulations governing  
7 petitions for remissions, Mr. Soto and Mr. Russell then filed a  
8 Supplemental Petition for Remission on March 2, 2007, which is  
9 still pending. Id.

10 **B. STATUTORY BACKGROUND**

11 **1. The Bald and Golden Eagle Protection Act**

12 The Bald an Golden Eagle Protection Act, which was enacted  
13 in 1940, provides comprehensive protection for bald and golden  
14 eagles. See 16 U.S.C. § 668; Andrus v. Allard, 444 U.S. 51, 57  
15 (1979) ("The broad proscriptive provisions of the Eagle  
16 Protection Act were consistently framed to encompass a full  
17 catalog of prohibited acts . . . ."). The Bald and Golden Eagle  
18 Protection Act imposes criminal and civil penalties on anyone  
19 who, unless excepted, takes, possesses, sells, purchases,  
20 barter, offers to sell or purchase or barter, transports,  
21 exports or imports at any time or in any manner a bald or golden  
22 eagle, alive or dead; or any part, nest or egg of these eagles.  
23 16 U.S.C. §§ 668(a)-(b). Under 16 U.S.C. § 668c, the Bald and  
24 Golden Eagle Protection Act's definition of the term "take" also  
25 includes those activities that would "molest or disturb," as well  
26 as "kill" or "injure" bald eagles.

1                   **2.    The Migratory Bird Treaty Act**

2           The MBTA was enacted in 1918 to implement a convention  
3 between the United States and Great Britain protecting migratory  
4 birds.<sup>3/</sup> 16 U.S.C. §§ 703, 712; see Convention between the United  
5 States and Great Britain for the protection of migratory birds,  
6 August 16, 1916, 39 Stat. 1702, T.S. No. 628. By enacting the  
7 MBTA, Congress asserted regulatory authority over migratory birds  
8 which previously had been exercised only by the individual  
9 states. See Missouri v. Holland, 252 U.S. 416 (1920). The  
10 cornerstone of the protections afforded by the MBTA is found in §  
11 703. 16 U.S.C. § 703(a). That section provides:

12                   Unless and except as permitted by regulations  
13                   made as hereinafter provided in this  
14                   subchapter, it shall be unlawful at any time,  
15                   by any means or in any manner, to pursue,  
16                   hunt, take, capture, kill, attempt to take,  
17                   capture, or kill, possess, offer for sale,  
18                   sell, offer to barter, barter, offer to  
19                   purchase, purchase, deliver for shipment,  
20                   ship, export, import, cause to be shipped,  
21                   exported, or imported, deliver for  
22                   transportation, transport or cause to be  
23                   transported, carry or cause to be carried, or  
24                   receive for shipment, transportation,  
25                   carriage, or export, any migratory bird, any  
26                   part, nest, or egg of any such bird, or any

21           <sup>3/</sup> The MBTA has since been amended to implement conventions  
22 which the United States has signed with Mexico, Japan, and the  
23 Soviet Union. See Convention between the United States and Mexico  
24 for the protection of migratory birds and game mammals, February 7,  
25 1936, United States-Mexico, 50 Stat. 1311, T.S. No. 912; Convention  
26 for the Protection of Migratory Birds and Birds and Their  
27 Environment, March 4, 1972, United States-Japan, 25 U.S.T. 3329,  
T.I.A.S. No. 7990; Convention Concerning the Conservation of  
Migratory Birds and Their Environment, November 19, 1976, United  
States-USSR, 29 U.S.T. 4647, T.I.A.S. No. 9073. The MBTA was  
amended in 1978 by the Fish and Wildlife Improvement Act to  
implement the United States-USSR Convention. 16 U.S.C. § 712.

product, whether or not manufactured, which consists, or is composed in whole or in part, of any such bird or any part, nest, or egg thereof, included in the terms of the conventions \* \* \* for the protection of migratory birds and birds in danger of extinction, and their environment \* \* \* .

Id.

Section 704 of the MBTA authorizes the Department of the Interior to determine when, and to what extent, to permit takings of migratory birds. 16 U.S.C. § 704. The Department of the Interior has issued regulations for this purpose. 50 C.F.R. §§ 21.1 et seq.

### 3. The Administrative Procedure Act

To the extent that there is any applicable waiver of sovereign immunity in this case, it is provided by the Administrative Procedure Act. Neither the Constitution nor the Declaratory Judgment Act provide a waiver of sovereign immunity. See, e.g., Boren Swindell & Assocs., L.L.P. v. Friedman, No. 05-64, 2006 WL 739990, \*3 (N.D. Tex. Mar. 23, 2006) (noting that "[t]he Declaratory Judgment Act, 28 U.S.C. § 2201(a), does not constitute a waiver of sovereign immunity because the Act 'neither provides nor denies a jurisdictional basis for actions under federal law, but merely defines the scope of available declaratory relief'" ) (quoting McCarthy v. Marshall, 723 F.2d 1034, 1037 (1st Cir.1983)); Raz v. Lee, 343 F.3d 936, 938 (8<sup>th</sup> Cir. 2003) (holding that the APA provides the waiver of sovereign immunity for a plaintiff's Constitutional claims). Moreover, neither the MBTA nor BGEPA contain a citizen-suit provision or otherwise provide a private cause of action. See Defenders of

1 Wildlife v. EPA, 882 F.2d 1294, 1302 (8<sup>th</sup> Cir. 1989).

2 If this case were to proceed to the merits, the judicial  
3 inquiry into whether an agency has fulfilled its substantive  
4 obligations under the law would be governed by the judicial  
5 review provisions of the Administrative Procedure Act, 5 U.S.C. §  
6 706. Such review "is generally limited to the record in existence  
7 at the time the agency made its decision." Sierra Club v. U.S.  
8 Fish & Wildlife Serv., 245 F.3d 434, 444 (5th Cir. 2001).

9 **STANDARD OF REVIEW**

10 Under Rule 12(b)(6), a claim may be dismissed when a  
11 plaintiff fails to allege any set of facts in support of his  
12 claim which would entitle him to relief. McConathy v.  
13 Dr.Pepper/Seven Up Corp., 131 F.3d 558, 561 (5th Cir. 1998); but  
14 see Bell Atlantic Corp. v. Twombly, -- S.Ct. ---, 2007 WL  
15 1461066 (U.S.) (holding that the "no set of facts" standard for a  
16 12(b)(6) motion is no longer controlling and "is best  
17 forgotten"). When considering a motion to dismiss, the court  
18 accepts as true the well-pled factual allegations in the  
19 complaint, and construes them in the light most favorable to the  
20 plaintiff. McConathy, 131 F.3d at 561. However, "conclusory  
21 allegations or legal conclusions masquerading as factual  
22 conclusions will not suffice to prevent a motion to dismiss."  
23 Southern Christian Leadership Conference v. Supreme Court of  
24 Lousiana, 252 F.3d 781, 786 (5<sup>th</sup> Cir. 2001) (quoting Fernandez-  
25 Montes v. Allied Pilots Ass'n, 987 F.2d 278, 284 (5th Cir.

1 1993)). In addition, courts may refer to matters of public  
2 record when deciding a Rule 12(b)(6) motion to dismiss. Davis v.  
3 Bayless, 70 F.3d 367, 372 n. 3 (5th Cir. 1995).

4 Rule 12(b)(1) allows motions for dismissal based on the  
5 argument that the federal court does not have the right to  
6 exercise its limited jurisdiction because of the subject matter  
7 presented in a complaint. Barrera-Montenegro v. United States,  
8 74 F.3d 657, 659 (5th Cir. 1996). "It is incumbent on all  
9 federal courts to dismiss an action whenever it appears that  
10 subject matter jurisdiction is lacking. 'This is the first  
11 principle of federal jurisdiction.'" Stockman v. Federal Election  
12 Commission, 138 F.3d 144, 151 (5th Cir.1998) (quoting Hart &  
13 Wechsler, The Federal Courts and the Federal System 835 (2d  
14 ed.1973)). As the party invoking jurisdiction, the plaintiff  
15 carries the burden of establishing subject-matter jurisdiction.  
16 Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377 (1994).  
17 The Court may examine evidence outside of the pleadings when  
18 deciding a Rule 12(b)(1) motion to dismiss for lack of subject-  
19 matter jurisdiction. Barrera-Montenegro, 74 F.3d at 659. It is  
20 well established that the district court may base its decision on  
21 a Rule 12(b)(1) motion on "(1) the complaint alone; (2) the  
22 complaint supplemented by undisputed facts evidenced in the  
23 record; or (3) the complaint supplemented by undisputed facts  
24 plus the court's resolution of disputed facts." Id. (quotations  
25 omitted).

## ARGUMENT

I. HECK V. HUMPHREY REQUIRES THE DISMISSAL OF THIS ACTION.<sup>4/</sup>

The conviction of Plaintiff Michael Cleveland in United States of America v. Cleveland, 06-MJ-04806, and the ongoing appeal of that conviction, bars Plaintiffs' claims in this suit.

In Heck v. Humphrey, 512 U.S. 477 (1994), the Supreme Court held that a plaintiff may not bring a civil suit collaterally attacking the validity of his criminal conviction unless that conviction has been previously overturned. 512 U.S. 477. In Heck, a plaintiff who had been previously convicted of a crime brought a 42 U.S.C. § 1983 action against the prosecutors and investigators who were responsible for his criminal conviction. Id. at 478-80. The Court found that the civil suit involved the same facts underlying plaintiff's criminal conviction and that a ruling in plaintiff's favor would necessarily call into question the validity of his conviction. Id. On these facts, the Court held that, before such a civil suit could proceed, a plaintiff's conviction must have been reversed on appeal, expunged by executive order, declared invalid by an authoritative state tribunal, or called into question by the issuance of a writ of habeas corpus by a federal court. Id. at 486-87.

Shortly after the Supreme Court decided Heck v. Humphrey, the Fifth Circuit applied the decision to facts that are similar

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<sup>4/</sup> With this motion, Defendants have focused on Heck v. Humphrey because it clearly mandates dismissal. In so doing, however, Defendants have not exhausted every available legal argument and reserve the right to move the Court for dismissal based on grounds not set forth in this motion should the case proceed.



1 to the case currently before the Court. In Boyd v. Biggers, a  
2 civil litigant attempted to challenge the constitutionality of  
3 his criminal conviction and sentence. 31 F.3d 279, 283 (5<sup>th</sup> Cir.  
4 1994). The Fifth Circuit initially noted that the complaint,  
5 among other things, alleged that the criminal investigator had  
6 violated the civil litigant's rights by withholding exculpatory  
7 evidence. Id. The Boyd court then found that if the civil  
8 litigant successfully proved these claims, it "would call [his]  
9 conviction into question under Brady v. Maryland []." Id. Based  
10 on these facts, the Fifth Circuit held that all of the civil  
11 litigant's claims fell squarely within the holding of Heck and  
12 affirmed the dismissal of plaintiff's complaint with prejudice.  
13 Id. at 284 (discussing whether it was appropriate to dismiss with  
14 or without prejudice). Further, in determining plaintiff's claims  
15 to be frivolous, the Fifth Circuit found it important that the  
16 civil litigant in Boyd was not seeking monetary damages but  
17 instead sought only to challenge the validity of his conviction.  
18 Id.

19 In the instant case, the encompassing premises of  
20 Plaintiffs' claims are (1) that Defendants have erred in  
21 interpreting the laws prohibiting the possession of certain  
22 feathers (e.g., the MBTA) as applying to Native Americans who are  
23 not registered members of federally recognized tribes and (2)  
24 that the FWS Agent's actions on March 11, 2006, violated  
25 Plaintiffs' Constitutional rights. These legal questions, and  
26 the underlying facts giving rise to them, are the exact issues  
27

1 before the court in United States of America v. Cleveland. This  
2 is demonstrated by the fact that many, if not all, of the legal  
3 claims asserted in this civil suit have also been asserted as  
4 defenses to the criminal prosecution in United States v.  
5 Cleveland. See generally Appeal Brief, Exhibit 3. Indeed, pages  
6 10-23 of Plaintiffs' Complaint in this action appear to have been  
7 taken directly from the appeal brief filed in United States v.  
8 Cleveland. Compare Exhibit 3 with Compl. Furthermore,  
9 Plaintiffs cite the trial transcript from United States v.  
10 Cleveland throughout their Complaint. See, e.g., Compl. at pp.  
11 10, 16, 17, 18, 19, 20, and 23. As a result, it is  
12 unquestionable that the facts underlying Mr. Cleveland's criminal  
13 conviction are also the basis for the instant action; and any  
14 success on Plaintiffs' claims here would call into question the  
15 validity of his criminal conviction and interfere with the  
16 ongoing appeal of that ruling. Accordingly, this suit must be  
17 dismissed pursuant to Heck.

18 The fact that Plaintiffs have asserted claims under the APA  
19 and the Declaratory Judgment Act, rather than § 1983, does not  
20 change the analysis. See Boyd, 31 F.3d at 283; Jeffery v. Owens,  
21 2006 WL 3625690, \*1 (5<sup>th</sup> Cir. 2006) (unpublished) (dismissing for  
22 failure to state a claim a request for a declaratory judgment on  
23 the basis of Heck); Summers v. Eidson, 2006 WL 3071226, \*1 (5<sup>th</sup>  
24 Cir. 2006) (same). Indeed, if anything, the fact that Plaintiffs  
25 have requested declaratory relief -- and not monetary damages --  
26 makes it even more clear that the primary purpose of this suit is  
27

1 to halt (or otherwise collaterally attack) the ongoing criminal  
 2 proceedings in United States of America v. Cleveland. This is  
 3 plainly not permitted in the Fifth Circuit. Johnson v. Onion,  
 4 761 F.2d 224, 226 (5<sup>th</sup> Cir. 1985) (holding that "[t]he  
 5 Declaratory Judgment Act does not provide a means whereby  
 6 previous judgments by state or federal courts may be reexamined,  
 7 nor is it a substitute for appeal or post conviction remedies'")  
 8 (quoting Shannon v. Sequeechi, 365 F.2d 827, 829 (10<sup>th</sup> Cir.  
 9 1966)).<sup>5/</sup>

10 In an effort to distinguish this case from Heck, Plaintiffs  
 11 are likely to note that Mr. Cleveland's criminal case does not  
 12 involve the BGEPA. In addition, Plaintiffs may argue that the  
 13 seizure of Plaintiffs Soto's and Russell's eagle feathers does  
 14 not involve the criminal prosecution of Plaintiff Cleveland in  
 15

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16 <sup>5/</sup> Plaintiffs' requested injunctive relief would also violate the  
 17 dictates of Heck. In their Complaint, Plaintiffs seek an  
 18 injunction "enjoining Defendants from enforcing the MBTA and BGEPA  
 19 against any Plaintiff anywhere within the jurisdiction of the  
 20 federal courts of the United States." Compl. at ¶ 5 (Prayer for  
 21 Relief). Because this requested relief would bar the government  
 22 from proceeding with the prosecution in United States v. Cleveland,  
 23 it would clearly run afoul of Heck. In addition, Plaintiffs'  
 24 requested injunctive relief is not available because it would  
 25 violate constitutional separation of powers by requiring the Court  
 26 to prospectively bar the Executive Branch from exercising its  
 27 prosecutorial discretion. See Heckler v. Chaney, 470 U.S. 821, 831  
 (1985) (noting that "an agency's decision not to prosecute or  
 enforce, whether through civil or criminal process, is a decision  
 generally committed to an agency's absolute discretion"); United  
 States v. Cox, 342 F.2d 167, 171 (5<sup>th</sup> Cir. 1965) ("It follows, as  
 an incident of the constitutional separation of powers, that the  
 courts are not to interfere with the free exercise of the  
 discretionary powers of the attorneys of the United States in their  
 control over criminal prosecutions").

1 United States v. Cleveland. Any such arguments would not change  
2 the outcome here. First, it is apparent from the Complaint that  
3 Plaintiffs' claims regarding the BGEPA involve the same legal  
4 theories at issue in Mr. Cleveland's prosecution under the MBTA.  
5 See Compl. at ¶¶ 38 and 39-84 (basing all Counts upon Defendants'  
6 interpretation and application of both the "MBTA and BGEPA").  
7 Second, for the reasons explained below, even if Heck does not  
8 apply to Plaintiffs' claims regarding the eagle feathers,  
9 Plaintiffs Soto and Russell have failed to exhaust their  
10 administrative remedies; therefore, any claims regarding the  
11 seizure of their eagle feathers are not ripe for review. See  
12 infra at 16.

13 Finally, Plaintiffs may claim that Heck applies only to Mr.  
14 Cleveland and not to the remaining named Plaintiffs. Any such  
15 argument would fail in several respects. First, regardless of  
16 the fact that there are numerous named Plaintiffs in this action,  
17 success by any one of them -- based upon the facts and legal  
18 theories at issue in United States v. Cleveland -- would  
19 undermine the criminal conviction of Mr. Cleveland and therefore  
20 violate the Heck v. Humphrey doctrine. Second, for the reasons  
21 explained below, Plaintiffs Soto and Russell have failed to  
22 exhaust their administrative remedies. Without the participation  
23 of Plaintiffs Cleveland, Soto, and Russell, the remaining  
24 Plaintiffs lack the requisite standing to bring this lawsuit.<sup>6/</sup>

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25  
26 <sup>6/</sup> Ordinarily, a litigant "must assert his own legal rights and  
27 interests, and cannot rest his claim to relief on the legal rights  
or interests of third parties.'" Valley Forge Christian College v.

For all the reasons explained above -- including the possibility of inconsistent rulings in the civil and criminal cases and the fact that a criminal defendant cannot utilize a civil suit to collaterally attack the validity of a criminal conviction -- this case falls squarely within the holding of Heck and it must be dismissed.

**II. THE COURT LACKS JURISDICTION OVER PLAINTIFFS' CLAIMS SEEKING THE RETURN OF EAGLE FEATHERS DUE TO PLAINTIFFS' FAILURE TO EXHAUST THEIR ADMINISTRATIVE REMEDIES.**

Assuming arguendo that the Court does not dismiss this case in its entirety based on Heck, it should dismiss Plaintiffs' claims regarding the forfeiture of eagle feathers because they are not ripe for review. See, e.g., Compl. at ¶¶ 67-70 (Count 6). Here, Plaintiffs Soto and Russell have availed themselves of the established administrative procedure for securing the return of their eagle feathers and that administrative process has not yet been completed. Thomes v. Equitable Sav. & Loan Ass'n, 837 F.2d 1317, 1318 (5<sup>th</sup> Cir. 1988) (holding that because plaintiffs "have not pursued their available administrative remedies, the constitutional issue presented is not ripe for determination"); Ibarra v. United States, 120 F.3d 472, 476 (4<sup>th</sup> Cir. 1997) (holding that where plaintiff's petition for reconsideration was

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Americans United for Separation of Church & State, 454 U.S. 464, 474 (1982) (quoting Warth v. Seldin, 422 U.S. 490, 499 (1975)). This is generally so even when the very same allegedly illegal act that affects the litigant also affects a third party. See United States v. Payner, 447 U.S. 727, 731-732 (1980) (criminal defendant "lacks [third-party] standing under the Fourth Amendment to suppress ... documents illegally seized from" his banker).

1 pending before the agency when she brought action in district  
2 court challenging forfeiture, district court lacked subject-  
3 matter jurisdiction; claimant was required to await outcome of  
4 administrative process that she invoked).

5 "Courts often decline to review an agency action because it  
6 is not final, it is not ripe, or the petitioner did not exhaust  
7 available administrative remedies. In many circumstances, the  
8 three doctrines are difficult to distinguish, because the same  
9 considerations of timing and procedural posture often can support  
10 a holding based on ripeness, finality, or exhaustion." American  
11 Airlines v. Herman, 176 F.3d 283, 287 (5<sup>th</sup> Cir. 1999) (citations  
12 omitted). Ripeness is an issue of subject-matter jurisdiction  
13 as to which a plaintiff has the burden of proof. See Manguno v.  
14 Prudential Prop. & Cas. Ins. Co., 276 F.3d 720, 723 (5th Cir.  
15 2002); Samaad v. City of Dallas, 940 F.2d 925, 934 and n. 16 (5th  
16 Cir. 1993) (noting that ripeness is jurisdictional matter that  
17 cannot be waived). "The ripeness doctrine is necessary to  
18 prevent courts from becoming entangled in abstract disputes by  
19 adjudicating an issue prematurely." American Med. Ass'n v.  
20 Bowen, 857 F.2d 267, 272 (5th Cir. 1988) (citing Thomas v. Union  
21 Carbide Agr. Products Co., 473 U.S. 568, 580 (1985)). Similarly,  
22 the exhaustion doctrine prevents courts from interfering with the  
23 administrative process until it has reached a conclusion.<sup>2/</sup>

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24  
25 <sup>2/</sup> In McKart v. United States, 395 U.S. 185 (1969), the Supreme  
26 Court noted that because the administrative agency is created as a  
27 separate entity and invested with certain powers and duties, the  
courts should not interfere with an agency until it has completed  
its action or clearly exceeded its jurisdiction. Id. at 194. The

1 Plaintiffs' Sixth Count regarding the alleged unlawful  
2 seizure of feathers and other items, Compl. at ¶ 67, and  
3 Plaintiffs' request for an order compelling the return of those  
4 feathers, Compl. at ¶ 6 (Prayer for Relief), involve the  
5 following: First, certain feathers were seized in accordance  
6 with the MBTA and are currently evidence in United States v.  
7 Cleveland. As a matter of common sense and for all the reasons  
8 discussed above, the migratory bird feathers at issue in United  
9 States v. Cleveland cannot be the subject of a civil suit  
10 demanding their return until the criminal proceedings are  
11 completed. Second, there are certain eagle feathers that were  
12 seized from, and abandoned by, Mr. Soto and Mr. Russell. As  
13 explained below, any claim seeking the return of these eagle  
14 feathers must be dismissed because they are not ripe due to  
15 Plaintiffs' failure to exhaust administrative remedies.

16 The Department of the Interior has established procedures  
17 for the return of seized property. The regulations found at 50  
18 C.F.R. § 12.24 set forth the procedures for filing a petition for  
19 remission in order to retrieve property that has been forfeited.  
20 50 C.F.R. § 12.24(a). The regulations specify the elements that  
21 must be included in a petition for remission. 50 C.F.R. §

22  
23  
24 Court enumerated the practical notions of judicial efficiency that  
25 are served by the exhaustion doctrine. For example, a complaining  
26 party may be successful in vindicating his rights in the  
27 administrative process. Thus, if a complainant is required to  
pursue and exhaust his administrative remedies, the courts may  
never have to intervene. Von Hoffburg v. Alexander, 615 F.2d 633,  
637 (5<sup>th</sup> Cir. 1980).

12.24(b). The Solicitor of the Department of the Interior decides whether or not to remit the property and, "[i]n making a decision, . . . consider[s] the information submitted by the petitioner . . . ." 50 C.F.R. § 12.24(e). "If the Solicitor decides that relief should not be granted, . . . [t]he petitioner may then file a supplemental petition [for remission]." 50 C.F.R. § 12.24(g).

Plaintiffs have availed themselves of this administrative remedy. In particular, Mr. Soto and Mr. Russell, by and through their attorney, filed a document that the Department of the Interior construed as a petition for remission on July 10, 2006. See Woodcock Decl., Exhibit 2, at ¶¶ 1-7. The petition for remission was denied as untimely. Id. Mr. Soto and Mr. Russell subsequently filed a supplemental petition for remission on March 2, 2007. Id. There has been no decision on that supplemental petition. Id. Consequently, Plaintiffs' administrative remedies have not been exhausted and the claims regarding the return of the eagle feathers should be dismissed.<sup>8/</sup>

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<sup>8/</sup> It should be noted that the eagles feathers at issue were voluntarily relinquished to the FWS. Specifically, Plaintiffs Soto and Russell signed a voluntary abandonment upon the release of the eagle feathers, which stated as follows:

I(we) hereby abandon and quitclaim all of my (our) right, title and interest in and to the above-described property to the United States and waive any further rights or proceedings relative to this property other than my (our) right to file a petition for remission of this property as authorized by 50 C.F.R. 12.24.

Woodcock Decl. at Exhibit B. As a result, once Plaintiffs do in fact exhaust their administrative remedies, it is not at all clear



1 **III. PLAINTIFFS HAVE NAMED IMPROPER PARTIES AS DEFENDANTS IN**  
 2 **THIS ACTION.**

3 Assuming for the sake of argument that the Court does not  
 4 dismiss Plaintiffs' entire Complaint based upon Heck v. Humphrey,  
 5 the Court should substitute the named Defendants with the  
 6 appropriate Federal entities. First, the currently named  
 7 Defendants should be dismissed from this suit because Plaintiffs  
 8 have failed to assert any actual claims or material allegations  
 9 against them. Summerlin v. Fronteriza Silver Mining & Milling  
 10 Co., 41 F. 249 (W.D. Tex. 1890) (holding that where a complaint  
 11 contains no allegations connecting one of the defendants with the  
 12 cause of action stated therein, the complaint will be dismissed  
 13 as to him); Houck v. Oklahoma Workers Comp. Court, No. Civ. No.  
 14 05-1247F, 2005 WL 3536092, \*2 (W.D. Okla. December 22, 2005)  
 15 (same).

16 Plaintiffs have named the following persons as  
 17 Defendants:

18 U.S. Attorney General, Alberto Gonzalez; U.S. Secretary  
 19 of the Department of the Interior, Dirk Kempthorne;  
 20 U.S. Fish and Wildlife Service Director H. Dale Hall;  
 21 U.S. Chief of the Office of Law Enforcement for the  
 FWS, Kevin R. Adams; Acting Regional Director, Region  
 Two, FWS, Benjamin Tuggle; Special Agent in Charge,  
 Region Two, FWS, Richard McDonald; U.S. Attorney,  
 Southern District of Texas, Donald DeGabrielle, Jr.;

22  
 23 that they will have a private right of action in Federal District  
 24 Court to challenge the forfeiture. Burke v. DEA, 968 F. Supp. 667  
 25 (M.D. Ala. 1997); ARCA Airlines, Ltda. v. U.S. Customs Serv., 726  
 26 F. Supp. 827, 830 (S.D.Fla. 1989) (noting that "remission decisions  
 27 are committed to the discretion of the executive") aff'd, 945 F.2d  
 413 (11<sup>th</sup> Cir. 1991). In any event, the Court need not reach this  
 issue because, as explained above, these claims are not ripe for  
 review due to a failure to exhaust administrative remedies.

1 Resident Special Agent in Charge, FWS, Gary Young; and  
2 U.S. Field Solicitor, Martin Steinmetz.

3 Compl., Caption, at 1. Plaintiffs, however, fail to allege that  
4 any of the named Defendants had any involvement in the alleged  
5 wrongdoing. Indeed, with regard to Defendant Martin Steinmetz,  
6 Plaintiffs even fail to describe him in the "Parties" section of  
7 the Complaint. That is, Martin Steinmetz's name is found in the  
8 caption but nowhere else in the Complaint. With regard to the  
9 other named Defendants, they are mentioned only in the "Parties"  
10 portion of the Complaint; they are not accused of taking any  
11 actions in the remainder of the Complaint. These Defendants  
12 should be dismissed from the case.<sup>2/</sup>

13 Second, if the Court determines that this case should  
14 proceed, the relevant agencies should be substituted as the named  
15 Defendants. Here, the named Defendants have been sued in their  
16 official capacity. As the Supreme Court has noted, official-  
17 capacity suits "'generally represent only another way of pleading  
18 an action against an entity of which an officer is an agent.'" Kentucky v. Graham, 473 U.S. 159, 165-66 (1985)(quoting Monell v.  
19 New York City Dep't of Social Servs., 436 U.S. 658, 690, n. 55  
20 (1978)). Further, the APA generally permits actions against "the  
21 agency by its official title . . . ." 5 U.S.C. § 703.  
22

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23 <sup>2/</sup> Although Plaintiffs make no factual allegations against  
24 Attorney General Gonzalez or United States Attorney DeGabrielle, it  
25 should be noted that they enjoy absolute immunity from any claim  
26 based upon their alleged decision to prosecute a case based on a  
27 particular interpretation of a statute. See Imbler v. Pachtman,  
424 U.S. 409 (1976) (noting that prosecutors enjoy absolute  
immunity for acts taken to initiate a prosecution).

1 Accordingly, should the Court not dismiss this suit based upon  
 2 Heck, the current Defendants should be dismissed and the United  
 3 States Department of the Interior and the United States Fish and  
 4 Wildlife Service should be substituted as the named Defendants.

5 **IV. IN THE ALTERNATIVE TO DISMISSAL, THIS ACTION SHOULD BE**  
 6 **STAYED.**

7 In Landis v. North American Co., 299 U.S. 248, 254-55,  
 8 (1936), the Supreme Court recognized that the power to stay  
 9 proceedings "is incidental to the power inherent in every court  
 10 to control the disposition of the causes on its docket. . . ."  
 11 Id. The exercise of this power is discretionary but appropriate  
 12 if it furthers the interests of justice. United States v.  
 13 Kordel, 397 U.S. 1 (1970). In a pre-Heck decision, the Fifth  
 14 Circuit provided guidance to assist district courts in their  
 15 assessment of the competing interest in parallel civil and  
 16 criminal actions. Specifically, the Fifth Circuit stated the  
 17 following:

18 There is a clearcut distinction between private interests in  
 19 civil litigation and the public interest in a criminal  
 20 prosecution, between a civil trial and a criminal trial, and  
 21 between the Federal Rules of Civil Procedure and the Federal  
 22 Rules of Criminal Procedure . . . The very fact that there  
 23 is clear distinction between civil and criminal actions  
 24 requires a government policy determination of priority:  
 25 which case should be tried first. Administrative policy  
 26 gives priority to the public interest in law enforcement.  
 27 This seems so necessary and wise that a trial judge should  
 give substantial weight to it in balancing the policy  
 against the right of a civil litigant to a reasonably prompt  
 determination of his civil claims or liabilities.

Campbell v. Eastland, 307 F.2d 478, 487 (5<sup>th</sup> Cir. 1962).<sup>10/</sup> Thus,

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10/ If the case were decided after Heck v. Humphrey, the Fifth  
 Circuit would likely have found that dismissal, rather than a stay,

1 the strong public interest in law enforcement warrants giving  
2 priority to a related criminal proceeding. Further, as a  
3 practical matter, allowing a civil action to proceed may  
4 impermissibly permit a civil litigant who is also a criminal  
5 defendant to obtain broader discovery than he could obtain in the  
6 criminal proceeding. See Campbell, 307 F.2d at 487.  
7 Consequently, at a minimum, a civil suit should be stayed pending  
8 the resolution of a parallel criminal action.

9 Here, in order to prevent prejudice to the pending criminal  
10 proceedings, the Court should stay this action until the parallel  
11 criminal case has been resolved. In addition, because the  
12 resolution of the criminal action may have a dispositive effect  
13 on the instant litigation, judicial economy will be furthered by  
14 permitting the criminal action to run its course. Further, the  
15 Court should, at a minimum, stay Plaintiffs' claims regarding the  
16 eagle feathers until the administrative process has terminated.  
17 Based on the foregoing, Federal Defendants ask the Court to stay  
18 the instant litigation -- as an alternative to dismissal -- until  
19 such time as the criminal action and the administrative process  
20 have been completed.

21  
22  
23  
24  
25  
26 \_\_\_\_\_  
27 was required.

1 DATED: May 21, 2007

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22  
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24  
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26  
27

**CERTIFICATE OF SERVICE**

I hereby certify that on May 21, 2007, I served a copy of  
the foregoing via overnight delivery, on the following:

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